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Religious Liberty under the Fourteenth Amendment

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RELIGIOUS LIBERTY UNDER THE FOURTEENTH AMENDMENT*

Since 1940 it has been established ¹ that the Fourteenth Amendment to the Constitution of the United States makes applicable to the states the protection of the First Amendment respecting religious freedom: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

An understanding of the protected scope of freedom of religion requires a recognition that the United States Supreme Court has safeguarded activity of an essentially religious nature under the cloak of other constitutional freedoms. Frequently the Court has spoken in terms of freedom of speech and press,² and there have been references to a freedom of silence³ and a freedom to hear.⁴ This judicial amplification of verbiage rather than concept is not always commendable, but an examination of these other concepts is imperative to any full determination of the extent and limits of freedom of religion under the Fourteenth Amendment.

Though freedom to believe is complete, the right of activity in the name of religious liberty is, in its very nature, not an absolute.⁵ As Justice Roberts stated in the *Cantwell*

*In the May issue of the Notre Dame Lawyer an article will appear showing the genesis of the application of the Fourteenth Amendment to the First Amendment.

¹ *Cantwell v. State of Connecticut*, 310 U. S. 296, 84 L. Ed. 1213 (1940).

² *Lovell v. Griffin*, 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666 (1938); *Schneider v. Irvington*, 308 U. S. 147, 84 L. Ed. 155, 60 S. Ct. 146 (1939); *Martin v. City of Struthers*, 319 U. S. 141, 87 L. Ed. 1315, 63 S. Ct. 862 (1943); *Murdock v. Pennsylvania*, 319 U. S. 105, 87 L. Ed. 1292 (1943).

³ *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 147 A. L. R. 674 (1943).

⁴ *Martin v. City of Struthers*, 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).

⁵ "The rights with which we are dealing are not absolute." Douglas, J., in *Murdock v. Pennsylvania*, 319 U. S. 105, 110, 87 L. Ed. 1292, 1297 (1943). Limitations under the Fourteenth Amendment have been recognized by the United States Supreme Court in *Cox v. New Hampshire*, 312 U. S. 569, 85 L. Ed. 1049,

case:⁶ "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts — the freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

There is no one test the Court has consistently applied in determining whether or not the particular activity is within the protection of the constitutional freedom of religion. The rule of reason⁷ is the easiest to enunciate but the most difficult in application and the least productive of consistency and system in the development of the concept. The

61 S. Ct. 762, 133 A. L. R. 1396 (1941); *Chaplinsky v. New Hampshire*, 315 U. S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942); *Prince v. Commonwealth of Massachusetts*, 321 U. S. 158, 88 L. Ed. 645 (1944); and *Re Summers*, 325 U. S. 561, 89 L. Ed. 1795 (1945).

⁶ 310 U. S. 296, 303, 84 L. Ed. 1213, 1218 (1940). See also the dissent of Justice Murphy in the original *Jones v. City of Opelika* case, 316 U. S. 584, 618, 86 L. Ed. 1691, 1713 (1942) which dissent has now become the opinion of the Court in 319 U. S. 103, 87 L. Ed. 1290, 63 S. Ct. 890 (1943): "Freedom of speech, freedom of the press, and freedom of religion all have a double aspect — freedom of thought and freedom of action. Freedom to think is absolute in its own nature; the most tyrannical government is powerless to control the inward workings of the mind. But even an aggressive mind is of no missionary value unless there is freedom of action, freedom to communicate its message to others by speech and writing. Since in any form of action there is a possibility of collision with the rights of others, there can be no doubt that this freedom to act is not absolute but qualified, being subject to regulation in the public interest which does not unduly infringe the right."

⁷ "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Robert, J., in *Cantwell v. Connecticut*, 310 U. S. 296, 304, 84 L. Ed. 1213, 1218 (1940). "Street preaching . . . can be regulated within reasonable limits." Rutledge, J., in *Prince v. Commonwealth of Massachusetts*, 321 U. S. 158, 169, 88 L. Ed. 645, 654 (1944). "We are concerned solely with the reasonableness of this particular prohibition of religious activity." Murphy, J., dissenting in *Prince v. Commonwealth of Massachusetts*, 321 U. S. at 173, 88 L. Ed. at 656 (1944). "Rational justification" should prevent the legislation from being unconstitutional. Frankfurter, J., dissenting in *West Virginia State Board of Education v. Barnette*, 63 S. Ct. 1178, 1198 (1943).

clear and present danger test⁸ has been recognized as applicable to freedom of religion⁹ but blithe disregard of this test, without disaffirmance, by the majority in the *Prince* case¹⁰ leaves doubt as to whether it is to be applied to all controversies affecting freedom of religion.

The area of religious liberty has been subject to confusion and uncertainty through the failure of the Supreme Court to enunciate and apply a test determinant of what activity is within the Constitutional protection, by a related unwillingness to indicate a usable criterion of "commercialism" that would remove an activity from the realm of religious activity,¹¹ by contradictions of judicial approach such as the Court's unwillingness to pass upon the fact of child labor in the *Prince* case¹² because the state court had held that it was, notwithstanding its proper recognition in the *Opelika*¹³ and *Murdock*¹⁴ cases of power to pass upon the reality of "commercialism" even though the state court had so denominated the activity, and lastly, by vacillation¹⁵ of members of the Court.

⁸ First suggested by Justice Holmes in *Schenk v. United States*, 249 U. S. 47, 52, 63 L. Ed. 470, 473, 39 S. Ct. 247 (1919), where he indicated that speech was not to be curtailed unless "the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

⁹ Justice Roberts for the Court in *Cantwell v. Connecticut*, "In the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction." 310 U. S. 296, 311, 84 L. Ed. 1213, 1221 (1940). Freedom of religion is "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *Jackson, J., in West Virginia State Board of Education v. Barnette*, 319 U. S. 639, 87 L. Ed. 1628, 1638 (1943). See also dictum in *Prince v. Massachusetts*, 321 U. S. 157, 167, 88 L. Ed. 645, 653 (1944) and dissent of Mr. Justice Murphy in the *Prince* case, 321 U. S. at 174, 88 L. Ed. at 657 (1944).

¹⁰ 321 U. S. 157, 88 L. Ed. 645 (1944).

¹¹ Most apparent in the original *Jones v. City of Opelika* case, 316 U. S. 584, 62 S. Ct. 1231 (1942).

¹² *Prince v. Commonwealth of Massachusetts*, 321 U. S. 157, 88 L. Ed. 645 (1944).

¹³ *Jones v. City of Opelika*, 316 U. S. 584, 62 S. Ct. 1231 (1942).

¹⁴ 319 U. S. 105, 87 L. Ed. 1292.

¹⁵ Justices Black, Douglas and Murphy felt they erred in the *Gobitis* case (310 U. S. 586) (1940) and took occasion to admit their error at the time of the

Such a situation demands something more than a case-to-case approach. The only satisfactory handling of the area seems to require an analysis of all the individual conflict situations that have arisen, with examination of the most frequently contradictory social and personal interests, and without anticipating consistency of rule or test from one conflict situation to another.

Freedom of Religion versus the Tax Power

The distribution of religious literature in return for money when done as a method of spreading the distributor's religious beliefs is an exercise of religion within the First Amendment and immune from taxation. After vacating its judgment in the original *Jones v. Opelika* case,¹⁶ the Supreme Court, at the October Term, 1942, handed down its decision in *Murdock v. Pennsylvania*¹⁷ which established that an ordinance imposing a flat license tax on distributors of religious materials, who were thus engaged in religious worship, was an unconstitutional invasion of the rights of freedom of religion and of speech and press. For the enjoyment of a right, such as freedom of religion, guaranteed by the federal Constitution, a state cannot exact a license tax. It should be obvious that the power to tax the exercise of religious worship is the power to suppress it.¹⁸ As Justice Jackson stated in the *Murdock* case,¹⁹ "The power to impose a license tax on the exercise of these freedoms is indeed as

original hearing of *Jones v. City of Opelika*, 316 U. S. 584, at 623-4 (1942). When the identical issue as in the *Gobitis* case was again presented in the *Barnette* case (87 L. Ed. 1628) (1943) only Mr. Justice Frankfurter continued in his belief that a compulsory flag salute was not violative of freedom of religion. The original *Jones v. City of Opelika* decision was, of course, vacated by the Supreme Court in 319 U. S. 104, 87 L. Ed. 1291 (1943).

¹⁶ 316 U. S. 584, 62 S. Ct. 1231 (1942). Criticized by many commentators. See: Antieau, "State Regulatory Laws and Religious Freedom" (1942), 6 U. Det. L. J. 131.

¹⁷ 319 U. S. 105, 87 L. Ed. 1292 (1943). Case noted in (1943) 42 Mich. L. R. 163.

¹⁸ *A. Magnano Co. v. Hamilton*, 292 U. S. 40, 78 L. Ed. 1109, 54 S. Ct. 599 (1934) and cases cited therein.

¹⁹ 319 U. S. 105 113, 87 L. Ed. 1292, 1298 (1943).

potent as the power of censorship which this Court has repeatedly struck down." It is easy to realize how readily itinerant ministers would be impoverished if subjected to license taxes by every community in which they preached or distributed literature.

To claim that a tax on the distribution of religious literature has constitutional validity because it is non-discriminatory is to advance no justification whatsoever. Recalling the language of the late Chief Justice Stone in the original *Jones v. Opelika* case, Justice Jackson effectively disposed of this assertion:²⁰ "The fact that the ordinance is 'non-discriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

Though conceding that the power to tax the dissemination of religious ideas "may be used to restrict" them,²¹ the dissenting Justices, Reed, Roberts and Frankfurter indulge at length in historical interpretations of the protections contained in the First Amendment. If there is one thing we should have learned by now it is that the historical approach has no contribution to make to an understanding of the proper place of religious liberty in contemporary America.²² We have a right to expect that a more mature society will rise above the irrational bigotry and religious persecution of the eighteenth century. Certainly one proof of societal

²⁰ 319 U. S. 105, 115, 87 L. Ed. 1292, 1300 (1943).

²¹ 319 U. S. 105, 130, 87 L. Ed. 1292, 1307 (1943).

²² For a scholarly criticism of the historical approach, see Summers: "The Sources and Limits of Religious Freedom" (1946) 41 Ill. L. R. 53, 56. To determine the extent of religious liberty, "the historical argument is wholly inconclusive . . . the Founding Fathers were novices in the field of religious freedom, for they had come from a background of bigotry and lived in an era of intolerance." See also, Myers, "History of Bigotry in the United States" (1943).

growth is recognition of the right of religious minorities to propagate their faith though their ideas are distasteful to today's majority.

The implication of Mr. Justice Reed that the majority opinion means "that church or press is free from the financial burdens of government"²³ is a distortion of both reality and the clearly expressed views of his colleagues. Listen to Justice Douglas speaking for the majority:²⁴ "We do not mean to say that religious groups and the press are free from all financial burdens of government. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." Again, Mr. Justice Douglas, speaking for the Court in *Follett v. McCormick*²⁵ carefully explains that exemption from tax on the distribution of religious materials as part of religious worship "does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. But to say that they, like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege." It is interesting to note that in *Follett v. McCormick*, Justice Reed concurs with Justice Douglas and the majority of the Court.

Taxation and materialistic statism have their defender in Mr. Justice Frankfurter who would allow such a tax on religious worship. Speaking of governmental benefits, he

²³ 319 U. S. 105, 127, 87 L. Ed. 1292, 1306 (1943).

²⁴ 319 U. S. 105, 112, 87 L. Ed. 1292, 1298 (1943).

²⁵ 321 U. S. 573, 577, 88 L. Ed. 938, 941 (1944).

says: ²⁶ "To secure them costs money, and a state's source of money is its taxing power." This sort of statement merely reiterates the obvious. The question remains whether taxation is to be a possible majority weapon to deprive religious minorities of the basic freedom to spread the faith they believe. There are adequate sources of tax revenue without infringing upon these "preferred constitutional privileges." Mr. Justice Frankfurter also states: ²⁷ "There is nothing in the Constitution which exempts persons engaged in religious activities from sharing equally in the costs . . ." Remarks such as this are deceptively unjust to ministers who share with all of us such costs as the property tax, the estate tax, the sales tax, the luxury tax, the poll tax, etc., etc. Just where is this "exemption" of which the learned Justice speaks?

Without more merit is the claim that itinerant ministers add measurably to the costs of government, so as to justify additional taxation. Justice Frankfurter's notion of "extra benefits" is daily belied in hundreds of instances. For example, read the testimony in *Busey v. District of Columbia*:²⁸ "Two police officers testified they (Jehovah's Witnesses) were not disorderly, and the prosecution's witnesses stated that they did not disturb the peace 'before, during or after arrest,' were 'quiet, not bothering anybody, were courteous and did not say anything out of the way at all.' They did not 'occupy too much space on the sidewalk,' did not have a stand, and nothing was spread out on the sidewalk." Neither in the *Opelika* case²⁹ nor in the *Murdock* case,³⁰ to mention but two, was there any showing or even claim by the state that the amount of the tax bore any reasonable relation to extra costs occasioned by, or extra benefits rendered to Jehovah's Witnesses. That the burden of

²⁶ 319 U. S. 105, 140, 87 L. Ed. 1292, 1313 (1943).

²⁷ *Ibid.*

²⁸ 129 F. (2d) 24, 35 (1942).

²⁹ 316 U. S. 584, 62 S. Ct. 1231 (1942).

³⁰ 319 U. S. 105, 87 L. Ed. 1292 (1943).

proving the extent of the expenses of licensing and regulation, so as to establish whether or not the fees exacted by the ordinance were in excess of the expenses of licensing, is properly on the state, see the *Busey* case³¹ where the Court held "that when legislation appears on its face to affect the use of speech, press or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen." One pays for the benefits of political life in these United States — including the privilege of religious freedom — under conditions of equality with one's fellow citizens. It seems neither common sense nor political wisdom to devise intricate accounting techniques capable of ascertaining the exact "extra benefits" conferred on smokers using the streets, for example, and charging them for the additional services rendered.

Nor is there anything startling in the decision of the *Murdock* case. It should be remembered that not even the majority in the original *Jones v. Opelika* case were willing to hold that the state's tax power extended to non-commercial activity. It was because they considered the activity commercial that the tax was sustained, as witness the words of Justice Reed, speaking for the majority, "But it is because we view these sales as partaking more of commercial than religious transactions that we find the ordinances, as here presented, valid."³² The minority in the original *Jones v. Opelika* case, whose position is now that of the Court, clearly indicated that a flat license tax on the distribution of religious literature was unconstitutional. Mr. Chief Justice Stone in his dissent stated:³³ "They (the First and Four-

³¹ 138 F. (2d) 592, vacating 129 F. (2d) 24, D. C. App. (1943).

³² 316 U. S. 584, 598 (1942).

³³ 316 U. S. 584, 608, 86 L. Ed. 1707 (1942).

teenth Amendments) extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it." The late Chief Justice added, "... on its face a flat license tax restrains in advance the freedom taxed and tends inevitably to suppress its exercise. The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws." And, Mr. Justice Murphy, also dissenting in the original *Opelika* case, stated: ³⁴ "Respondents do not show that the instant activities of Jehovah's Witnesses create special problems causing a drain on the municipal coffers, or that these taxes are commensurate with any expenses entailed by the presence of the Witnesses. In the absence of such a showing I think no tax whatever can be levied on petitioners' activities in distributing their literature or disseminating their ideas."

In *Follett v. McCormick* ³⁵ the Supreme Court held that a tax on the distribution of religious materials as part of a religious observance is equally unconstitutional when the distributor's activities are confined to his home town and he depends for his livelihood on contributions requested in return for the literature distributed. Mr. Justice Douglas, speaking for the Court, stated: ³⁶ "A flat license tax on that constitutional privilege would be as odious as the early 'taxes on knowledge' which the framers of the First Amendment sought to outlaw. A preacher has no less a claim to that privilege when he is not an itinerant . . . The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint. For, to repeat, 'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment.'"

³⁴ 316 U. S. 584, 620, 86 L. Ed. 1714 (1942). See also the words of Mr. Justice Murphy, concurring in *Martin v. Struthers*: The distribution of religious literature cannot be conditioned "upon payment of a license tax for the privilege of so doing." 319 U. S. 141, 150, 87 L. Ed. 1317, 1321 (1943).

³⁵ 321 U. S. 573, 88 L. Ed. 938 (1944).

³⁶ 321 U. S. 573, 577, 88 L. Ed. 938, 941 (1944).

The power of the state to charge a nominal regulatory fee for services rendered belongs more properly under a discussion of the police power and it will be there examined, but before leaving the conflict-area of freedom of religion versus the tax power a word of warning from the Supreme Court jurist who has shown the greatest recognition of fundamental values and evangelistic pragmatics, "It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds,"³⁷

*Freedom of Religion versus the Police Power;
(a) Prohibition and Censorship*

Neither a state nor a municipality can completely bar the distribution of religious literature on its streets, sidewalks, and public places or make the right to distribute dependent on a permit to be issued by an official who could deny it at will.³⁸

The *Cantwell* case held unconstitutional as an unreasonable infringement of religious freedom a Connecticut statute subjecting to fine anyone soliciting for a religious cause without having first secured a license from the secretary of the state public welfare council who could deny the license if he felt that the cause was not "a religious one" or was not "a bona fide object of charity or philanthropy." Mr. Justice Roberts, speaking for the Court, said:³⁹ "No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of guaranty . . . Such a censorship of religion (as allowing the state official to pass upon the 're-

³⁷ Mr. Justice Murphy in *Follett v. McCormick*, 321 U. S. 573, 579, 88 L. Ed. 938, 942 (1944).

³⁸ *Cantwell v. Connecticut*, 310 U. S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, 128 A. L. R. 1352 (1940).

³⁹ 310 U. S. 296, 304, 84 L. Ed. 1213 1218 (1940).

ligious' cause) as a means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." Justice Roberts added,⁴⁰ "To condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." This was the rule of law espoused by a unanimous Court in the *Cantwell* case.

Since *Lovell v. Griffin*⁴¹ it has been clear that the right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances.

In *Jamison v. Texas*⁴² the Court re-emphasized this rule, basing it on freedom of religion as well as on freedom of speech and press — only speech and press had been mentioned in the *Lovell* case, and held that it applied even though the literature being distributed contained an advertisement or invitation to contribute to the missionary work of the Jehovah's Witnesses by purchasing books related to the faith of the group. Though recognizing the rule of *Valentine v. Chrestensen*⁴³ that states can prohibit the use of the streets for the purpose of purely commercial leaflets, even though such leaflets may have "a civic appeal, or a moral platitude" appended, the Court properly held this was religious, not commercial activity, and hence not subject to prohibition. States or municipalities "may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or be-

⁴⁰ 310 U. S. 296, 307, 84 L. Ed. 1213, 1219 (1940).

⁴¹ 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666 (1938).

⁴² 318 U. S. 413, 87 L. Ed. 869 (1943).

⁴³ 316 U. S. 52, 86 L. Ed. 1262, 1265, 62 S. Ct. 920 (1942).

cause the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." There was no dissent in *Jamison v. Texas*.

*Largent v. Texas*⁴⁴ was decided the same day as *Jamison v. Texas* and the United States Supreme Court took occasion to repeat that a municipal ordinance making it unlawful to distribute religious literature without first obtaining a permit which is to be issued only if the mayor deemed it proper or advisable was an unconstitutional abridgment of freedom of religion, and press and speech.

Also at the October Term, 1942, the Supreme Court handed down its decision in *Martin v. City of Struthers*.⁴⁵ The City of Struthers, Ohio, had enacted a municipal ordinance making it unlawful for any person distributing literature "to ring the door bell, sound the door knocker, or otherwise summon the inmate . . . to the door." The Court held that, as applied to the distribution of religious literature, the ordinance was an unconstitutional violation of freedom of speech and press. Here there is a clash between the right of distribution of religious literature and "the interest of the community which by this ordinance offers to protect the interests of all its citizens, whether particular citizens want that protection or not."⁴⁶ Though Mr. Justice Black, speaking for the Court, does not mention freedom of religion, it is obviously involved here and Mr. Justice Murphy, in a concurring opinion,⁴⁷ speaks at length of its applicability. In this view he is joined by Justices Douglas and Rutledge. From the view of the majority in the *Struthers* case Justice Frankfurter dissented on the ground that the police power should be large enough to ban the ringing of doorbells, and that the legislature is the judge of necessity, not the Court. Mr. Justice Reed, joined by Justices Roberts and Jackson,

⁴⁴ 318 U. S. 418, 87 L. Ed. 873 (1943).

⁴⁵ 319 U. S. 141, 87 L. Ed. 1313, 63 S. Ct. 862 (1943).

⁴⁶ 319 U. S. 141, 143, 87 L. Ed. 1313, 1316 (1943).

⁴⁷ 319 U. S. 141, 149, 87 L. Ed. 1313, 1320 (1943).

dissented on the view that the city council was proper agent for the householders in forbidding bellringing, and that "The ordinance seems a fair adjustment of the privilege of distributors and the rights of householders."⁴⁸

Nor can managers of a company-owned town bar all distribution of religious literature within the town, or condition distribution upon a permit issued at the discretion of its management. *Marsh v. Alabama*,⁴⁹ decided at the October Term, 1945, held that a state statute making it a crime to enter or remain on the premises of another after having been warned not to do so is, when applied to distributors of religious literature on a street of a company-owned town, contrary to the wishes of the town's management, unconstitutional as an infringement of the guarantees of freedom of press and of religion. Mr. Justice Black, speaking for the Court, said:⁵⁰ "The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution." It is interesting to note that Mr. Justice Frankfurter joins the majority in the *Marsh* case. The dissent by Mr. Justice Stone, and Justices Reed and Burton, is particularly strange considering the attitude of the late Chief Justice in earlier cases, and without particular merit. The dissenters indulge in this language,⁵¹ "The rights of the owner (of the company town) . . . are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech." The language of the law of property is not particularly useful in dealing with the "preferred constitutional privileges" of freedom of religion

⁴⁸ 319 U. S. 141, 157, 87 L. Ed. 1313, 1324 (1943)

⁴⁹ 90 L. Ed. (Adv. Op.) 227 (1945).

⁵⁰ 90 L. Ed. (Adv. Op.) 227, 230 (1945).

⁵¹ 90 L. Ed. (Adv. Op.) 227, 235 (1945).

and press. A company-town is primarily a community of American citizens, entitled to Constitutional privileges, and secondarily a piece of privately-owned property.

Also decided January 7, 1946, was *Tucker v. Texas*⁵² which differed from the *Marsh* case only in that a company-owned town was not involved, but rather a Federal Government owned and operated village. The Court ruled that the management of a governmentally-owned village could not prohibit distribution of religious literature, or make it contingent upon a permit which might be denied at will. A state statute that makes it unlawful for a distributor of religious literature to refuse to leave the government-owned village after notification by possessor is unconstitutional as violative of the guarantees of freedom of religion and press. As in the *Marsh* case, the late Chief Justice Stone and Justices Reed and Burton dissented on grounds already indicated.

*Freedom of Religion versus the Police Power;
(b) the Public Peace*

Recognizing that the cases in this area will inevitably exemplify the conflict-situation between freedom of religion and the interest of the state in the preservation of peace and good order, the problem here is to weigh the conflicting interests with an approach such as that indicated by the Court in *Cantwell v. Connecticut*: has the State's interest "been pressed . . . to a point where it has come into *fatal* collision with the *overriding* interest protected by the federal compact?"⁵³

When first recognizing Fourteenth Amendment protection to freedom of religion, the Court made it clear that preservation of the public peace would at times necessitate reasonable inroads into the area of religious liberty. Justice

⁵² 90 L. Ed. (Adv. Op.) 235 (1946).

⁵³ 310 U. S. 296, 307, 84 L. Ed. 1213, 1220. Italics supplied (1940).

Roberts, speaking for the Court in the *Cantwell* case, stated: ⁵⁴ "It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community without unconstitutionally invading the liberties protected by the Fourteenth Amendment." Later in the same case, ⁵⁵ "The state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience." And, again, ⁵⁶ "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to punish is obvious."

However, as the Court pointed out ⁵⁷ in the *Cantwell* case, it will take something more than the generalized and indefinite concept of the common law breach of peace to infringe upon freedom of religion under the Fourteenth Amendment. The state must employ "a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger." ⁵⁸ And freedom of religion will prevail in those cases resting on speech to another when there is "no assault or threatening of bodily harm," no "statements likely to provoke violence and disturbance of good order," "no truculent bearing, no intentional discourtesy, no personal abuse." ⁵⁹

⁵⁴ 310 U. S. 296, 304, 84 L. Ed. 1213, 1218 (1940).

⁵⁵ 310 U. S. 296, 306 307, 84 L. Ed. 1213, 1219 (1940).

⁵⁶ 310 U. S. 296, 308, 84 L. Ed. 1213, 1220 (1940).

⁵⁷ 310 U. S. 296, 311, 84 L. Ed. 1213, 1221 (1940).

⁵⁸ *Ibid.*

⁵⁹ 310 U. S. 296, 309, 310, 84 L. Ed. 1213, 1221 (1940).

Within the same year, the United States Supreme Court had occasion to determine that a statute, properly drawn and interpreted, could constitutionally limit activity claimed by the actors to be a form of religious worship. In *Cox v. New Hampshire*⁶⁰ the Court sustained the conviction of five Jehovah's Witnesses who, with sixty-three others, paraded without a permit on a busy Saturday evening along the crowded main streets of Manchester, a city of 75,000 people. The New Hampshire statute⁶¹ read: "No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon, shall be permitted, unless a special license therefor shall first be obtained from the selectmen of the town, or from a licensing committee for cities hereinafter provided for." The statute also provided for licensing fees ranging from a nominal sum to three hundred dollars. The Supreme Court of New Hampshire had interpreted the statute to provide that the board could take into consideration only the convenience of the public use of the highways in granting or refusing a license for a particular place and time, and that it could not discriminate. The State Court held that the defendants "had a right under the Act, to a license to march when, where and as they did, if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon conditions or changes in time, place and manner as would avoid disturbance." The State Supreme Court had held that the statute in no way regulated the distribution of religious literature by individuals or groups not constituting a parade or a procession. The highest State Court had also ruled that the fee section of the Act permitted only a "reasonable" fee, "not a revenue tax, but one to meet the expense incident to the administration of the Act and the

⁶⁰ 312 U. S. 569, 85 L. Ed. 1049 (1941).

⁶¹ New Hampshire Public Laws, chapter 145, section 2.

maintenance of public order in the matter licensed." So interpreted and so applied, the statute was not an unconstitutional infringement of freedom of religion, speech or press. Chief Justice Hughes, for the Court, likened the need for conformity to reasonable traffic regulations to the necessity to conform to the common traffic signal. "One would not be justified" he remarked,⁶² "in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions." In disposing of the claim that the statute as so interpreted violated constitutional guarantees of freedom of religion, the late Chief Justice stated: ⁶³ "The argument as to freedom of worship is also beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions." This is loose, meaningless, and dangerous language. The defendants obviously thought their right of religious worship was interfered with, and there was no contest of their sincerity. "In any proper sense" has absolutely no utility as a test beyond this case and these speakers. The late Chief Justice spoke with more claim to consideration when he suggested ⁶⁴ that a usable test in this sort of conflict-situation should be this: "The question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

Cox v. New Hampshire is authority for the rule that police power can constitutionally make inroads into religious liberty by (1) statutorily requiring persons contemplating a public parade or procession on streets or sidewalks to make

⁶² 312 U. S. 569, 574, 85 L. Ed. 1049, 1053 (1941).

⁶³ 312 U. S. 569, 578, 85 L. Ed. 1049, 1055 (1941).

⁶⁴ 312 U. S. 569, 574, 85 L. Ed. 1049, 1053 (1941).

prior application for a permit which can be denied by public officials acting reasonably and without discrimination only on grounds of inconvenience to the public use; and (2) requiring the payment of a reasonable and nominal fee for the issuance of the permit, said fee to be no larger than the costs of issuance and extra police expense directly occasioned by the activity licensed.

In 1942 the Supreme Court recognized another limitation on religious liberty under the police power. A New Hampshire statute⁶⁵ provided that "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . ." The State Supreme Court had earlier held⁶⁶ that the purpose of the statute was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom individually the remark is addressed." While being brought to a police station by a traffic officer, a Jehovah's Witness called the city marshal "a damned Fascist" and "a damned racketeer." The defendant attempted to introduce evidence of alleged neglect of duty on the part of the police, but the trial court refused to admit and the State Supreme Court sustained, holding that neither provocation nor the truth of the utterance would constitute a defense to the charge. So interpreted, the statute was held constitutional by the United States Supreme Court, and the conviction of the Jehovah's Witness sustained. Mr. Justice Murphy, speaking for the Court, disposed of the claim that freedom of religion was violated in these words: ⁶⁷ "And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which pre-

⁶⁵ New Hampshire Public Laws, chapter 378, section 2.

⁶⁶ *State v. Brown*, 68 N. H. 200, 38 A. 731 (1895); *State v. McConnell*, 70 N. H. 294, 47 A. 267 (1900).

⁶⁷ *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571, 86 L. Ed. 1031, 1035 (1942).

ceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute." Justice Murphy indicates that the constitutional protection of freedom of speech and religion does not extend to "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." ⁶⁸ *Chaplinsky v. New Hampshire* thus holds that one engaged in religious worship, at least to his own creed and notion, has no claim to protection of freedom of religion or speech when he violates a statute by uttering "offensive, derisive or annoying" words which "men of common intelligence would understand would be words likely to cause an average addressee to fight." The present author has little enthusiasm for such a rule. The remedy of damages for slander will ordinarily be effective compensation to one denominated a fascist or racketeer in a religious sermon. Walking away, in the usual situation, might even be considered. When freedom of religion and speech is at stake, what prevents the United States Supreme Court from passing upon the propriety of a state statute which denies the defense of provocation in slander? This hardly seems consistent with the judicial techniques indorsed by Mr. Justice Murphy in the original *Opelika* case and by the Court in the *Murdock* case where commercialism was decidedly an open question notwithstanding the fact that the state court had spoken on this point. And, what does Justice Murphy mean when he says, "they (constitutional protections of the Fourteenth Amendment) would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute." Whether or not the infringing statute is "legal" and "valid" is the question to be decided by the Court . . .

⁶⁸ 315 U. S. 568, 572, 86 L. Ed. 1031, 1035 (1942).

this is not predetermined. Further, Mr. Justice Murphy has elsewhere stated that any legislative attempt to infringe upon religious freedom is *prima facie invalid*. In *Prince v. Massachusetts*,⁶⁹ he states, "The human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable, and any attempt to sweep away those freedoms is *prima facie invalid*." One wonders if religious freedom under the rule of the *Chaplinsky* case is large enough to protect Him who said of another, "Pharisee," an annoying appellation in its time.⁷⁰

As indicated earlier, *Martin v. City of Struthers*⁷¹ holds that the police power does not enable a municipality to decide for all of its inhabitants that distributors of religious literature can not ring door bells or knock on the door to call the attention of the residents to their literature and their ideas. This is not a matter to be decided by organized society, but by individual residents who might, by such a sweeping ordinance, be denied the right to receive ideas. There is indication⁷² in the *Struthers* case that a properly drawn statute could prohibit such ringing of door bells, etc., at homes where the residents had indicated that such was not their wish.

*Freedom of Religion versus the Police Power;
(c) Protection of Children*

In 1944 the United States Supreme Court handed down its decision in *Prince v. Commonwealth of Massachusetts*⁷³

⁶⁹ 321 U. S. 158, 173, 88 L. Ed. 645, 656 (1944).

⁷⁰ Riesman in 42 Col. L. R. 1282, 1311 (1942) indicates, in commenting on the *Chaplinsky* case, that "the law can usually afford to disregard the most serious political defamation by a Witness against a non-Witness."

⁷¹ 319 U. S. 141, 87 L. Ed. 1313, 63 S. Ct. 862 (1943).

⁷² "The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities (We do not by this reference, mean to express any opinion on the wisdom or validity of the particular proposals of the Institute) which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs — with the homeowner himself. A city

which established that the state could constitutionally prohibit a girl under eighteen from disseminating religious literature on the streets, although she believed that by so doing she was discharging a religious duty. Here the claim of religious freedom was denied before the conflicting right of the state to protect children. The Massachusetts statute made it a crime for a boy under twelve or a girl under eighteen to "sell, expose or offer for sale" literature or merchandise, and also made it a crime for a guardian to "compel or permit" a minor under his control to "sell" such articles. Mrs. Prince, the defendant, permitted her nine year-old ward to distribute the "Watchtower" and "Consolation." The evidence is clear that they were no farther than twenty feet apart at the time of distribution. Mr. Justice Rutledge, speaking for the Court, indicated clearly ⁷⁴ that the clash was between "on one side the obviously earnest claim for freedom of conscience and religious practice" and "the parent's claim to authority . . . in the rearing of her children," and "against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children and the state's assertion of authority to that end." He conceded that "a statute or ordinance identical in terms . . . except that it is applicable to adults or all persons generally, would be invalid." ⁷⁵ The Court was obviously thinking in terms of the dangers from child labor and quite properly concerned for the welfare of the child. However, there was no clear and present danger to the child or to society on the facts of the *Prince* case. The youngster was not working in a factory nor even unaccompanied on the street.

From the decision of the majority in the *Prince* case, Justice Murphy dissents on the ground that "religious train-

can punish those who call at a home in defiance of the previously expressed will of the occupant . . ." 319 U. S. at 148, 87 L. Ed. at 1319 (1943).

⁷³ 321 U. S. 158, 88 L. Ed. 645 (1944).

⁷⁴ 321 U. S. 158, 165, 88 L. Ed. 645, 652 (1944).

⁷⁵ 321 U. S. 158, 167, 88 L. Ed. 645, 653 (1944).

ing and activity, whether performed by adult or child, are protected by the Fourteenth Amendment against interference by state action, except insofar as they violate reasonable regulations adopted for the protection of the public health, morals and welfare,"⁷⁶ and that "the state . . . has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect."⁷⁷ Like the majority, Mr. Justice Murphy recognizes that this case presents "a square conflict between the constitutional guarantee of religious freedom and the state's legitimate interest in protecting the welfare of its children." With the majority, Justice Murphy indicates that the test is that of reasonableness. "We are concerned solely with the reasonableness of this particular prohibition of religious activity by children," he states.⁷⁸ So long as he feels the test is one of reasonableness, one cannot overlook the fact that the Legislature of Massachusetts thought it reasonable, as did the other members of the Court. Elsewhere, Justice Murphy indicates that perhaps the clear and present danger test should apply to this conflict-situation,⁷⁹ and the test is not disaffirmed by the majority.⁸⁰ If Mr. Justice Murphy believes that clear and present danger is the proper test, this would have been the case to forsake the language of reasonableness and stress the applicability of Holmes' idea to the conflicts of police power versus the freedom of religion.

In the *Prince* case the Court was unwilling to pass upon the interpretation of the State Court that the distribution of religious literature in the usual manner of Jehovah's Witnesses constituted a "sale" by the girl, so as to bring both

⁷⁶ 321 U. S. 158, 172, 88 L. Ed. 645, 655 (1944).

⁷⁷ 321 U. S. 158, 174, 88 L. Ed. 645, 657 (1944).

⁷⁸ 321 U. S. 158, 173, 88 L. Ed. 645, 656 (1944).

⁷⁹ "The evils must be grave, immediate, substantial." 321 U. S. at 175, 88 L. Ed. at 657; and see note No. 77.

⁸⁰ 321 U. S. 158, 167, 88 L. Ed. 645, 653 (1944).

her and her guardian within the sanctions of the statute.⁸¹ This is an amazing about-face from the Court's holding in the *Opelika*⁸² and *Murdock*⁸³ cases where the Court was quite willing to hold that there was no "commercialism" involved in distributing religious literature, even though the state courts had so denominated the activity. When basic and fundamental liberties are involved, certainly the interpretation of the *activity* (vastly different from interpretation of the statute) should be within the scope of the Supreme Court's powers.

The present author feels that the Court erred in its decision in the *Prince* case for it is obvious that there was in substance no child labor on the facts of the case. The child was accompanied and protected by her aunt, and the activity was undeniably of a religious nature. To deny the rights of religious worship when there is no clear and present danger to either the child or society is inadvisable.⁸⁴

Although the *Prince* case clearly makes inroads into the concept of freedom of religion under the Fourteenth Amendment, there is no justification for an assumption that the state can now prohibit the religious activities of altar boys or others worshipping their God in churches and off the streets. Mr. Justice Rutledge, for the Court, went to considerable length to indicate that the rule of the *Prince* case is not to be expanded. "Our ruling does not extend beyond the facts the case presents," he stated.⁸⁵ "We neither lay the foundation 'for any (that is, every) state intervention in the indoctrination and participation in religion' which

⁸¹ "As the case reaches us, the questions are no longer open whether what the child did was a 'sale' or an 'offer to sell' . . . or was 'work!'" 321 U. S. 157, 163, 88 L. Ed. 645, 650 (1944).

⁸² *Jones v. City of Opelika*, 316 U. S. 584, 62 S. Ct. 1231 (1942).

⁸³ *Murdock v. Commonwealth of Pennsylvania*, 319 U. S. 105, 87 L. Ed. 1292 (1943).

⁸⁴ An excellent criticism of the rule of the majority in the *Prince* case is contained in Green, "Liberty Under the Fourteenth Amendment," 43 Mich. L. R. 437, 442 (1944).

⁸⁵ 321 U. S. 158, 171, 88 L. Ed. 645, 655 (1944).

may be done 'in the name of their health and welfare' nor give warrant for 'every limitation on their religious training and activities.' The religious training and indoctrination of children may be accomplished in many ways, some of which, as we have noted, have received constitutional protection through decisions of this Court. These and all others except the public proclaiming of religion on the streets, if this may be taken as either training or indoctrination of the proclaimer remain unaffected by the decision."

Freedom of Religion versus the Police Power;

(d) Defense of the State

Since *West Virginia State Board of Education v. Barnette*,⁸⁶ it is clear that the state or municipality may not require of students compelled to be in school a compulsory flag salute contrary to their religious beliefs. There the United States Supreme Court took occasion to expressly overrule its earlier holding to the contra in *Minersville School District v. Gobitis*.⁸⁷ The Court now recognized that patriotism cannot be instilled by forcing ritual and symbolism on one whose deepest religious beliefs hold such activity abhorrent. Mr. Justice Jackson saw the "ultimate futility of such attempts to compel coherence,"⁸⁸ and added, "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."⁸⁹

Justices Black, Douglas and Murphy concurred in separate opinions. Justices Black and Douglas, in reversing their position from the earlier *Gobitis* case, joined in stating,⁹⁰

⁸⁶ 319 U. S. 624, 87 L. Ed. 1628 (1943). Case noted in 42 Mich. L. R. 319 (1943).

⁸⁷ 310 U. S. 586, 84 L. Ed. 1375, 60 S. Ct. 1010 (1940).

⁸⁸ *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 641, 87 L. Ed. 1628, 1639 (1943).

⁸⁹ *Ibid.*

⁹⁰ 319 U. S. 624, 644, 87 L. Ed. 1628, 1640 (1943).

"We cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation." They now believe "that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments."⁹¹ Mr. Justice Murphy feels that freedom of religion far outweighs any benefits that might accrue to the state from compulsory declarations of allegiance which "requirement is not essential to the maintenance of effective government and orderly society."⁹²

Justices Reed and Roberts dissent without opinion beyond the brief word that they believe the rule of the *Gobitis* case should be continued. Justice Frankfurter wrote a lengthy dissent in which he admitted that "patriotism cannot be enforced by the flag salute,"⁹³ but he persuasively stressed his belief that it is not the function of the Court to enforce the liberal spirit on illiberal legislatures.

In the *Barnette* case the United States Supreme Court indicated most certainly that the test of clear and present danger is applicable to the clash of religious freedom versus the police power. Justice Jackson, speaking for the Court, said:⁹⁴ "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression."

⁹¹ 319 U. S. 624, 643, 87 L. Ed. 1628, 1640 (1943).

⁹² 319 U. S. 624, 645, 87 L. Ed. 1628, 1641 (1943).

⁹³ 319 U. S. 624, 670, 87 L. Ed. 1628, 1654 (1943).

⁹⁴ 319 U. S. 624, 633, 87 L. Ed. 1628, 1635 (1943).

Justice Jackson, speaking for the Court in the *Barnette* case, distinguishes it from *Hamilton v. Regents of University of California*⁹⁵ in that attendance at the University of California was optional, whereas school attendance in the instant case was required. Furthermore, "that case is also to be distinguished from the present one because . . . the State has power to raise militia and impose the duties of service therein upon its citizens,"⁹⁶ which, of course, was not at issue in the *Barnette* case. Justice Frankfurter does not consider the distinction apt and remarks,⁹⁷ "The Constitution does not give us greater veto power when dealing with one phase of 'liberty' than with another, or when dealing with grade school regulations than with college regulations that offend conscience." As when he spoke for the majority in the now over-ruled *Gobitis* case, Justice Frankfurter believes that the propriety of the legislation is for the legislature and not the Court. "Rational justification"⁹⁸ is the test of constitutionality and he finds it in the act of the legislature and also in the fact that thirteen justices of the Supreme Court had at one time considered such legislation reasonable and constitutional. To an extent not found in the other cases the Court in the *Barnette* case indicates that the rule of reason or "rational justification" is not the determinant of constitutionality, but rather the test of clear and present danger. Furthermore, since *Schneider v. New Jersey*⁹⁹ it has been clear that there is no presumption of constitutionality to a legislative enactment limiting civil rights. Certainly there was no clear and present danger to

⁹⁵ 293 U. S. 245, 79 L. Ed. 343, 55 S. Ct. 197 (1934).

⁹⁶ 319 U. S. 624, 632, 87 L. Ed. 1628, 1634 (1943).

⁹⁷ 319 U. S. 624, 648, 87 L. Ed. 1628, 1642 (1943).

⁹⁸ *West Virginia State Board of Education v. Barnette*, 63 S. Ct. at 1198 (1943), cited *supra*.

⁹⁹ 308 U. S. 147 at 161 (1939): "In every case therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

the defense of the land by the failure of an elementary school student to assume a position supposedly symbolizing patriotism.

In 1945 freedom of religion again clashed with the defense of the state *in re Summers*.¹⁰⁰ There the majority of the court held that a state could constitutionally deny admission to the bar to one otherwise qualified who was unwilling to serve in the state militia, if ever required, because of a religious belief in non-violence. Petitioner was a conscientious objector and "the sincerity of petitioner's beliefs are not questioned."¹⁰¹ Resting heavily on the analogy to the federal government's refusal to grant citizenship to the alien who refused to pledge military service, the majority felt that the State of Illinois could insist that "an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois" and indicate "a willingness to perform military service."¹⁰²

From the position of the majority, Justices Black, Douglas, Murphy and Rutledge dissent in forceful and persuasive language. Justice Black "cannot believe that a state statute would be consistent with our constitutional guarantee of freedom of religion if it specifically denied the right to practice law to all members of one of our great religious groups, Protestant, Catholic, or Jewish."¹⁰³ Yet, he points out, the Quakers would every one be barred from the practice of law if they remain true to the tenets of their faith. The dissenting justices are "not ready to say that a mere profession of belief in (Christ's) Gospel is a sufficient reason to keep otherwise well qualified men out of the legal profession, or to drive lawabiding lawyers of that belief out of the profession, which would be the next logical development."¹⁰⁴

¹⁰⁰ 325 U. S. 561, 89 L. Ed. 1795 (1945).

¹⁰¹ *In re Summers*, 325 U. S. 561, 571, 89 L. Ed. 1795, 1802 (1945).

¹⁰² *In re Summers*, 325 U. S. 561, 573, 89 L. Ed. 1795, 1803 (1945).

¹⁰³ *In re Summers*, 325 U. S. 561, 575, 89 L. Ed. 1795, 1805 (1945).

¹⁰⁴ *In re Summers*, 325 U. S. 561, 576, 89 L. Ed. 1795, 1805 (1945).

Truly there is room for growth in our concept of freedom of religion when five of the members of the Court feel there is no unreasonable infringement of religious liberty when one otherwise qualified is denied admission to the bar solely because he believes in literally following the words of Christ. The facile doctrine that privileges can be denied, even though rights can not, has already occasioned more sophistry and abuse than justice and it is time to be disavowed. Surely the right to employment should not be conditioned upon orthodoxy of religious belief any more than religious tests can be required of federal office holders.¹⁰⁵ The purpose of professional qualification statutes is not to encourage the superficial externals of hypocrisy, but to protect society from unqualified practitioners. If the applicant possesses the skills of his profession and a sense of responsibility to his clients, he should not be denied the right to practice.

There is presently considerable room to doubt whether the United States Supreme Court would again hold as it did in the *Summers* case if faced with the problem anew. As indicated above, the Court relied heavily on the *Schwimmer*¹⁰⁶ and *Macintosh*¹⁰⁷ cases for analogy. "It is impossible for us to conclude" stated¹⁰⁸ Mr. Justice Reed, for the majority, "that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois and Illinois' interpretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action, when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship." In 1946 the Supreme Court in *Girouard v. United*

¹⁰⁵ U. S. Const., Art VI, § 3; ". . . no religious test shall ever be required as a qualification to any office of public trust under the United States."

¹⁰⁶ U. S. v. Schwimmer, 279 U. S. 644, 73 L. Ed. 889, 49 S. Ct. 448 (1929).

¹⁰⁷ U. S. v. Macintosh, 283 U. S. 605, 75 L. Ed. 1302, 51 S. Ct. 570 (1931).

¹⁰⁸ *In re Summers*, 325 U. S. 561, 573, 89 L. Ed. 1795, 1803 (1945).

*States*¹⁰⁹ set aside the rule of the *Schwimmer* and *Macintosh* cases. Mr. Justice Douglas, speaking for the Court in the *Girouard* case, stated,¹¹⁰ "We conclude that the *Schwimmer*, *Macintosh* and *Bland* cases do not state the correct rule of law." The statutory requirement that an applicant for citizenship take an oath to support and defend the Constitution does not operate to exclude from citizenship one unwilling, because of religious scruples, to take up arms in defense of the country. The following words of Mr. Justice Douglas would be most appropriate in application to the facts of the *Summers* case: "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State."¹¹¹ With this rectification of the rule of the *Schwimmer* case there is less reason in analogy than in logic for perpetuation of the undesirable rule of the *Summers* case. It is to be hoped that the United States Supreme Court will set aside this unfortunate¹¹² decision at an early opportunity.

*Freedom of Religion versus the Police Power;
(e) Preventing Public Frauds*

Since the United States Supreme Court first recognized the Fourteenth Amendment protection of religious freedom, it has been clear that the state has power to prevent public

¹⁰⁹ 90 L. Ed. (Adv. Op.) 776 (1946).

¹¹⁰ 90 L. Ed. (Adv. Op.) 776, 781 (1946).

¹¹¹ *Girouard v. U. S.*, 90 L. Ed. (Adv. Op.) 776, 780, 781 (1946).

¹¹² The decision *in re Summers* is capably criticized in 19 So. Cal. L. R. 53 (1945), "It is submitted that fitness to practice as a lawyer is not gauged by personal religious beliefs. Is it not conceivable that this 'test oath' to undertake military service might well be required of plumbers, architects, realtors, or other of the many fields in which state licenses are prerequisite to practice? If so, to what extent will it be carried? Is the power to earn a living to be regulated by one's religious beliefs? Were this followed to a logical conclusion, it would be entirely possible to exclude from any or all professions one or more of our great religious groups — as for example the Quakers, whose very creed is bottomed on non-violence."

fraud by appropriate technique, even though there is an attendant inconvenience to ministers of religion and other distributors of religious literature or solicitors of funds for religious purposes. Mr. Justice Roberts, speaking for the Court in *Cantwell v. Connecticut*, stated:¹¹³ "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent."

It seems obvious that reasonable regulations can be drawn that will prevent or limit public frauds by solicitors of funds while still preserving the right of persons to legitimately distribute and solicit. Mr. Justice Murphy, concurring in *Martin v. City of Struthers*,¹¹⁴ states: "No doubt there may be relevant considerations which justify considerable regulation of door to door canvassing, even for religious purposes, — regulation as to time, number and identification of canvassers, etc., which will protect the privacy and safety of the home and yet preserve the substance of religious freedom."

An interesting case involving freedom of religion as a defense to a prosecution for using the mails to defraud is *United States v. Ballard*.¹¹⁵ The First Amendment, rather than the Fourteenth, is concerned but the approach and rule would be equally applicable to a similar situation under the latter. The Supreme Court there held that the Constitu-

¹¹³ 310 U. S. 296, 306, 84 L. Ed. 1213, 1219 (1940).

¹¹⁴ 319 U. S. 141, 151, 87 L. Ed. 1313, 1321 (1943).

¹¹⁵ 322 U. S. 78, 88 L. Ed. 1148 (1944).

tional guaranty of freedom of religion prevented a jury from passing upon the truth or falsity of the religious beliefs or doctrines professed by the accused. If the defendants honestly and in good faith believed the things said in statements sent through the mail there was no use of the mails to defraud, so said the District Court. The jury found the defendants guilty, but the Circuit Court of Appeals reversed the judgment of conviction and granted a new trial because it felt that the restriction of the issue to that of good faith was error. In turn, the Circuit Court was reversed because the Supreme Court did "not agree that the truth or verity of respondent's religious doctrines or beliefs should have been submitted to the jury."¹¹⁶ Mr. Justice Douglas, speaking for the Court, said:¹¹⁷ "The religious views espoused by respondents might seem incredible, if not preposterous to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect." The case was remanded to the Circuit Court to pass upon other objections to constitutionality made by the accused. In a dissenting opinion Justice Jackson indicated that the whole prosecution should be defeated. He "would dismiss the indictment and have done with this business of judicially examining other people's faiths."¹¹⁸ At the other extreme were the late Chief Justice Stone and Justices Frankfurter and Roberts. They were "not prepared to say that the constitutional guaranty of freedom of religion affords immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences . . ."¹¹⁹ They felt that there was no legally sufficient reason for disturbing the verdict of guilty rendered by the jury and recommended that the verdict be reinstated.

¹¹⁶ 322 U. S. 78 at 86, 88 L. Ed. 1148 at 1153 (1944).

¹¹⁷ 322 U. S. 78 at 87, 88 L. Ed. 1148 at 1154 (1944).

¹¹⁸ 322 U. S. 78 at 95, 88 L. Ed. 1148 at 1158 (1944).

¹¹⁹ U. S. v. Ballard, 322 U. S. 78 at 88, 88 L. Ed. 1148 at 1155 (1944).

In spite of the three separate opinions in the *Ballard* case it seems clear that freedom of religion is not, of itself, a defense to a prosecution for the fraudulent procurement of money, but that no jury is permitted to pass upon the merits of the religious beliefs and doctrines of the accused in such a prosecution.

Freedom of Religion versus Property Rights

Since *Martin v. City of Struthers* there has been considerable opinion that the right of privacy of the home has been violated at the expense of freedom of religion. This is largely attributable to the loose language of Mr. Justice Jackson in his dissent: "Nor am I convinced that we can have freedom of religion only by denying the American's deep-seated conviction that his home is a refuge from the pulling and hauling of the market place and the street. For a stranger to corner a man in his home, summon him to the door and put him in the position either of arguing his religion or of ordering one of unknown disposition to leave is a questionable use of religious freedom."¹²⁰ This is an unfortunate interpretation of the position of the majority. Careful examination of the Court's position should indicate clearly that the householder has been denied no rights by the rule of the *Struthers* case. He can refuse to answer the door; he can order any obnoxious caller off the property and use reasonable force to eject the trespasser; he can post a sign indicating that certain callers are unwelcome, and can sue violators for damages in trespass. Furthermore, the words of the majority are heavy with the implication that the state or municipality need only provide for decision where it belongs — with the householder, and so providing, a criminal trespass statute will most certainly be sustained.¹²¹

¹²⁰ 319 U. S. 141 at 181, 87 L. Ed. 1313 at 1338 (1943).

¹²¹ "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more . . . any similar

Not a word of the majority opinion justifies the position that the rights of privacy have been violated. The *Struthers* case merely prevents the state or municipality from denying the householder the right to receive ideas and literature. The decision is with the individual, not with the body politic.

Speaking for the Court in the *Struthers* case, Mr. Justice Black stated:¹²² "The ordinance . . . substitutes the judgment of the community for the judgment of the individual householder." He added:¹²³ "The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."

The conflict between freedom of religion and private property has to now been most direct in *Marsh v. Alabama*.¹²⁴ There the Supreme Court held that a company-owned town, though private property, cannot exclude a distributor of religious literature. Mr. Justice Black, speaking for the Court, remarked:¹²⁵ "We do not agree that the corporation's property interests settle the question . . . Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it . . . Whether a corporation or a municipality owns or possesses the town, the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."

regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs — with the homeowner himself." 319 U. S. 148, 87 L. Ed. at 1319.

¹²² 319 U. S. 141 at 144, 87 L. Ed. 1313 at 1317 (1943).

¹²³ 319 U. S. 141 at 147, 87 L. Ed. 1313 at 1319 (1943).

¹²⁴ 90 L. Ed. (Adv. Op.) 227 (1946).

¹²⁵ *Marsh v. Alabama*, 90 L. Ed. (Adv. Op.) 227 at 229 (1946).

Future conflict-situations in this area will be well resolved if the Court continues the approach indicated by Mr. Justice Black in the *Marsh* case: "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."¹²⁶

*Freedom of Religion and the Justices of the
United States Supreme Court*

It is, of course, too early to attempt a statement of the Chief Justice's philosophy of either the concept of religious freedom or the role of the judiciary, although his background is that of a liberal and there seems little reason to believe that he will narrow the area of constitutionally protected freedom of religion.

Mr. Justice Murphy has been the most zealous of the high court jurists in protecting freedom of religion under the Fourteenth Amendment. His judicial philosophy is best indicated by these words from his concurring opinion in *West Virginia State Board of Education v. Barnette*: "Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches."¹²⁷ As indicated earlier¹²⁸ Justice Murphy continues to subscribe to the test of reasonableness in determining constitutional derogations of the freedom, and so long as he does he will have to recognize that considerable weight must be given to the opinion of the legislature and his colleagues as to the reasonableness of any attempted infringement. He has indicated approbation of the clear and present danger test¹²⁹ but he is apparently not ready to advance this as the determinant of constitutionality

¹²⁶ *Marsh v. Alabama*, 90 L. Ed. (Adv. Op.) 227 at 231 (1946).

¹²⁷ 319 U. S. at 645, 87 L. Ed. at 1641 (1943).

¹²⁸ Note 78 *supra*.

¹²⁹ Note 79 *supra*.

in the area of religious freedom. Of course, Mr. Justice Murphy believes that freedom of religion is in preferred position when the Court faces conflicts involving religious liberty and other public or private interests.¹³⁰

Mr. Justice Black and Mr. Justice Douglas, and to a somewhat lesser degree, Mr. Justice Rutledge, have been unwilling to sustain the attempted infringements of religious freedom. Mr. Justice Black clearly considers freedom of religion to occupy a "preferred position."¹³¹ In this attitude he is joined by Mr. Justice Douglas who, in speaking for the Court in the *Murdock* case, said:¹³² "Freedom of press, freedom of speech, freedom of religion are in a preferred position." Although these three members of the court blithely overlooked the clear and present danger test in the *Prince* case,¹³³ in spite of advocacy by counsel, Justices Black and Douglas have at other times indicated recognition that it is applicable to the area of religious freedom.¹³⁴ There seems little likelihood, however, that they will substitute this for the test of reasonableness in the usual case involving freedom of religion.

In the *Barnette* case Mr. Justice Jackson showed some solicitude to protect freedom of religion against the claims of police power. There he even indicated that he felt the clear and present danger test was applicable to conflict-situations involving freedom of religion. "It is now a commonplace," he said,¹³⁵ "that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of

¹³⁰ See, for example, his concurring opinion in *Martin v. Struthers*, 319 U. S. at 151, 152, 87 L. Ed. at 1321 (1943).

¹³¹ *Marsh v. Alabama*, 90 L. Ed. (Adv. Op.) 227, 231 (1946).

¹³² *Murdock v. Pennsylvania*, 319 U. S. at 115, 87 L. Ed. at 1300 (1943).

¹³³ *Prince v. Commonwealth of Massachusetts*, 321 U. S. at 167, 88 L. Ed. at 653 (1944).

¹³⁴ See concurring opinion in *West Virginia State Board of Education v. Barnette*, 319 U. S. at 644, 87 L. Ed. at 1640 (1943).

¹³⁵ *West Virginia State Board of Education v. Barnette*, 319 U. S. at 633, 87 L. Ed. at 1635 (1943).

action of a kind the State is empowered to prevent and punish." However, he dissented in the *Struthers* case, the *Murdock* case, and the *Follett* case, and joined with the restrictive majority in the *Prince* and *Summers* cases. Justice Jackson's attitude is probably best indicated by his concurring opinion in the *Prince* case: ¹³⁶ "This case brings to the surface the real basis of disagreement among members of this Court in previous Jehovah's Witness cases . . . Our basic difference seems to be as to the method of establishing limitations which of necessity bound religious freedom. My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public." Justice Jackson also indicated that, in his opinion, constitutional protections of religious freedom end when the individual leaves the church. In speaking of asking for contributions in public, he states: ¹³⁷ "All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution." Seemingly, Justice Jackson cannot be expected to expand the present Constitutional concept of freedom of religion.

Justice Reed has usually been found with those willing to allow triumph of some other interest, public or private, over freedom of religion. He believes in the clear and present danger test as applied to the constitutional concept of freedom of speech. In the case of *Pennekamp v. Florida*, he stated: ¹³⁸ "A theoretical determinant of the limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the clear and present

¹³⁶ 321 U. S. at 177, 88 L. Ed. at 658 (1944).

¹³⁷ 321 U. S. at 178, 88 L. Ed. 659 (1944).

¹³⁸ 90 L. Ed. (Adv. Op.) 1001, 1003 (1946).

danger rule . . . We are not willing to say under the circumstances of this case that these editorials are a clear and present danger." Is it that Mr. Justice Reed feels that freedom of religion is entitled to a lesser Constitutional protection?

In the short time Mr. Justice Burton has been on the high court it is difficult to ascertain his philosophy concerning the Constitutional protection of freedom of religion. In the *Marsh*¹³⁹ and *Tucker*¹⁴⁰ cases, however, he joined with Mr. Justice Reed in dissenting, and these indications point to the probability of his viewing the judicial and Constitutional protection of freedom of religion rather narrowly.

The attitudes of Mr. Justice Frankfurter in condoning infringements of the concept of religious freedom have appeared particularly paradoxical to many of his friends, but his reasons are well set forth in his dissenting opinion in the *Barnette* case. There he stated:¹⁴¹ "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime." However, he makes it clear, "one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench";¹⁴² with Holmes, he agrees, "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."¹⁴³ Furthermore, he detects a serious inconsistency between the contemporary Holmesian attitude of the Court in giving great respect to the legislative will when due process is involved, and according lesser respect when freedom of re-

¹³⁹ *Marsh v. Alabama*, 90 L. Ed. (Adv. Op.) 227 (1946).

¹⁴⁰ *Tucker v. Texas*, 90 L. Ed. (Adv. Op.) 235 (1946).

¹⁴¹ *West Virginia State Board of Education v. Barnette*, 319 U. S. at 646, 87 L. Ed. at 1642 (1943).

¹⁴² 319 U. S. at 647, 87 L. Ed. at 1642 (1943).

¹⁴³ 319 U. S. at 649, 87 L. Ed. at 1643 (1943).

ligion, speech and press are at issue. The closing paragraph of Mr. Justice Frankfurter's dissent is exceptional judicial prose: "Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit." ¹⁴⁴

In *Pennkamp v. Florida*,¹⁴⁵ Mr. Justice Frankfurter indicates that he does not consider the clear and present danger test to be applicable to the great majority of cases involving freedom of speech, press, and religion. "'Clear and present danger'", he states, "was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases." In his dissent in the *Prince* case he had said,¹⁴⁶ "But to measure the state's power to make such regulations as are here resisted by the imminence of national danger is wholly to misconceive the origin and purpose of the concept of 'clear and present danger.' To apply such a test is for the Court to assume, however unwittingly, a legislative responsibility that does not belong to it."

¹⁴⁴ 319 U. S. at 670, 671, 87 L. Ed. at 1654 (1946).

¹⁴⁵ 90 L. Ed. (Adv. Op.) 1001, 1012 (1946).

¹⁴⁶ 319 U. S. at 663, 87 L. Ed. at 1650 (1943).

Under Mr. Justice Frankfurter's philosophy of the role of the Court in a democracy it is for the legislature, rather than the judiciary, to be the protector of our fundamental liberties. Admittedly this controversy and decision is basic to the democratic process. Surely, the fundamental freedoms of religion, press and speech will be better protected and more zealously safeguarded if every legislature is every day convinced of such a sense of values. However, the present author feels that Justice Frankfurter errs in his renunciation of judicial power. It is not a denial of the fundamentals of the democratic process to doubt that every one of our legislatures will day in and day out respect the fundamental freedoms of the American way of life. To ensure that these un-American and unconstitutional acts would be wiped out as soon as possible was one of the very important reasons for adopting a system of checks and balances. To doubt the eternal wisdom of "today's majority" is the very heart and essence of a system of constitutional government.¹⁴⁷ Judicial restraint must continue to be imposed upon the aberrant instances of legislative irrationality. To respect the legislative will is one thing; to sanctify it above the Constitution is something else.

C. J. Antieau.

¹⁴⁷ "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . .", *West Virginia State Board of Education v. Barnette*, 63 S. Ct. 1178, at 1185 (1943).